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No. 99 - ____ OFFICE OF THE

IN THE
Supreme Court of the United States

Roz Ben Zvi and Luiz Ben-Zvi,
Petitioners,

v.

United States of America,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a general verdict, multi-object conspiracy conviction stand when at least one of the alleged objects of the conspiracy is legally invalid and substantive counts corresponding to a different object of the conspiracy are affirmed?

2. Does the federal money laundering statute extend to funds that are proceeds of a theft which preceded the wire fraud charged as the "specified unlawful activity"?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Luiz Ben Zvi and Roz Ben Zvi respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 168 F.3d 49 (2nd Cir. 1999) and is reprinted in the Appendix ("App.") at 1a-21a. That Court's Order denying rehearing and rehearing *en banc* is reprinted in the Appendix at 22a-23a.

JURISDICTION

The United States Court of Appeals for the Second Circuit issued its opinion and entered its judgment on January 21, 1999. Petitioners filed timely petitions for rehearing and suggestions for rehearing *en banc*. The Court of Appeals denied the petitions for rehearing and suggestions for rehearing *en banc* on April 14, 1999. App. at 22a-23a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

> when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 371 of Title 18 of the United States Code provides in relevant part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined no more than $10,000 or imprisoned not more than five years, or both.

Section 1956(a) of Title 18 of the United States Code provides in relevant part:

> (2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States-
>
> . . . .
>
> > (B) knowing that the monetary instrument or funds . . . represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part –

> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.
>
> . . .

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both.

STATEMENT OF THE CASE

1. Introduction

On February 26, 1988, Petitioner Roz Ben Zvi, owner of Josi Jewelry, a substantial gold chain manufacturing business in Manhattan's gold district, and his sister, Petitioner Luiz Ben Zvi, reported a robbery of Josi Jewelry. Josi Jewelry filed an insurance claim with Lloyd's of London for approximately four million dollars. In August 1988, Lloyd's of London wired payment to its New York attorney for disbursement of the insurance claim.

In August 1993, the government filed a two count indictment against Luiz Ben Zvi in the Eastern District of New York, charging wire fraud in violation of 18 U.S.C. § 1343, and conspiracy to commit wire fraud in violation of 18 U.S.C. § 371 by allegedly causing an electronic funds transfer of $3,995,000 from Lloyd's of London to New York in payment of the insurance claim. In September 1993, Roz Ben Zvi (who, unlike Luiz, had entered into an agreement for a three-month tolling of the limitations period) was added as a defendant to the two-count indictment.

By two superseding indictments in March and May 1994, Count 1 was expanded to include allegations of an elaborate plan by both Petitioners and others to sell the gold inventory of Josi Jewelry for $2,000,000 in cash before the February 26, 1988 robbery, cause some of the cash proceeds to be transported overseas and cause the return of these funds by wire from Switzerland and Israel to various bank accounts in the United States between May 17, 1988 and March 3, 1989. All of these amendments were made to the part of the indictment charging overt acts of the conspiracy. In addition to the original object of the conspiracy – to defraud Lloyd's of London in violation of 18 U.S.C. § 1343 – the government added three additional objects. Count 1 now alleged a conspiracy to conduct a financial transaction involving the proceeds of a wire fraud to conceal the nature, source, etc. of the proceeds in violation of 18 U.S.C. § 1956(a)(1)(B)(i) (object #2); to transfer funds from or to the United States knowing that the funds represent proceeds of a wire fraud to conceal the nature, source, etc. of the proceeds in violation of 18 U.S.C. § 1956(a)(2)(B)(i) (object #3) and to impede the Internal Revenue Service in determining income taxes due to the United States (object #4).

In addition, eight particular fund transactions from Israel and Switzerland to New York were individually charged in separate substantive counts as violations of the domestic and international money laundering statutes, 18 U.S.C. §§ 1956(a)(1)(B)(i) and 1956(a)(2)(B)(i), respectively, with "wire fraud" charged as the "specified unlawful activity." Roz Ben Zvi was also charged in two counts with filing false personal and corporate income tax returns in violation of 26 U.S.C. § 7206(1).

The trial court gave a "one-is-enough" charge regarding the conspiracy count, instructing the jury that the jury had to unanimously agree that the Petitioners sought to

accomplish one of the four objects of the conspiracy charged in Count 1. The jury convicted both Roz Ben Zvi and Luiz Ben Zvi upon a general verdict of the multi-object conspiracy (Count 1) and four counts each of domestic and international money laundering (Counts 8-11, 16-19). (The trial court denied Petitioners' request after jury instructions for a special verdict as to the conspiracy objects.) Roz Ben Zvi was also convicted of an additional count of domestic and international money laundering (Counts 5 and 13) and of filing false income tax returns (Counts 2 and 3). Roz Ben Zvi was thereafter sentenced to concurrent terms on each count that totaled ten years' imprisonment. Luiz Ben Zvi received concurrent terms on each count for a total of five years' imprisonment. Restitution, criminal forfeiture and special assessments were also ordered.

2. The Second Circuit's Decision

The Court of Appeals for the Second Circuit reversed all of the money laundering counts (domestic and international) against Luiz Ben Zvi and all but four of these counts against Roz Ben Zvi as barred by the statute of limitations. App. 6a-8a.

The Second Circuit also dismissed the domestic money laundering counts that remained against Roz Ben Zvi (Counts 10 and 11) because the jury charge on these counts contained "substantial errors," and because these counts were multiplicitous with the two international money laundering counts corresponding to the same wire transactions. App. at 11a-16a. The Second Circuit affirmed the conviction of Roz Ben Zvi on the two remaining international money laundering counts (Counts 18 and 19). The Second Circuit found that the district court had not committed "plain error" despite the fact that it recognized that the district court had recited the elements for the domestic money laundering section as the elements

of the international money laundering charge, and had excluded from the international money laundering charge the requirement that the transmittal of funds be into or outside of the United States. App. at 16a-17a.

The Second Circuit rejected Petitioners' argument that the reversal of the money laundering counts also required reversal of the conspiracy count. App. 8a-10a. Petitioners argued that because the money laundering counts were legally deficient, and were charged as objects of the conspiracy, it was impossible to tell which ground the jury had selected in convicting the Petitioners of conspiracy. The Second Circuit instead held that, as to Luiz Ben Zvi, "the jury necessarily found that she engaged in the object of wire fraud," which was an element of the time-barred money laundering counts. App. at 9a. As to Roz Ben Zvi, the Second Circuit found only that there was sufficient evidence in support of the substantive counts so that "no reasonable jury could find that the government failed to establish" the international money laundering object and the false tax filing object of the conspiracy. App. at 9a. The Second Circuit then concluded – without further analysis – that it was not "impossible to tell which ground the jury selected" and that Petitioners' convictions for the multi-object conspiracy were valid.

REASONS FOR GRANTING THE WRIT

The Second Circuit's ruling breaks with precedent of this Court, conflicts with decisions of other circuits, and dramatically expands the law governing multi-object conspiracies. At least three other circuits require that a general verdict, multi-object conspiracy must be reversed where one object charged in the conspiracy is found to be legally invalid, whether or not the defendant was also convicted of a substantive count corresponding to a legally valid object. Luiz Ben Zvi and Roz Ben Zvi were charged

with a conspiracy having four objects. The Second Circuit expressly recognized that at least one of those objects of the conspiracy – domestic money laundering – was invalid as a matter of law.

In the absence of a special verdict, it is "impossible to tell" which of the four objects the jury found was the basis for the requisite agreement between the Petitioners. It is possible – even likely – that the jury premised its conspiracy conviction on the legally invalid domestic money laundering counts without endorsing (or even addressing) the other objects of the conspiracy.

This petition presents a significant question that should be addressed by this Court because the Second Circuit's ruling constitutes a dramatic expansion of the law of conspiracy. It allows a multi-object conspiracy conviction to stand even though that conviction may rest on a legally erroneous basis. This decision conflicts directly with established precedent in this Court and the decisions of other circuits and should be reversed.

I. THE SECOND CIRCUIT'S RULE CONFLICTS WITH THIS COURT'S DECISIONS AND THE DECISIONS OF OTHER CIRCUITS AND REPRESENTS AN UNWARRANTED AND DANGEROUS EXTENSION OF THE LAW OF CONSPIRACY

The Second Circuit's ruling conflicts with other circuits which hold that a court must set aside a general verdict on a multi-object conspiracy where one or more of the objects was legally invalid even though the defendant was convicted of a substantive count corresponding to a legally valid object. *See United States v. Boots*, 80 F.3d 580, 589 (1st Cir. 1996), *cert. denied*, 519 U.S. 905 (1996); *United States v. Palazzolo*, 71 F.3d 1233, 1237 (6th

Cir. 1995); *United States v. DeLuca*, 692 F.2d 1277, 1281 (9th Cir. 1983); *United States v. Carman*, 577 F.2d 556, 567-68 (9th Cir. 1978); *United States v. Gallagher*, 576 F.2d 1028 (3d Cir. 1978).

These cases derive directly from decisions of this Court that compel the reversal of a general verdict if one of the grounds supporting conviction was legally or constitutionally invalid. *See generally Stromberg v. California*, 283 U.S. 359 (1931); *Yates v. United States*, 354 U.S. 298 (1957), *overruled on other grounds*, *Burks v. United States*, 437 U.S. 1, 98 (1978); *cf. Griffin v. United States*, 502 U.S. 46 (1991). In each of these cases, this Court reaffirmed the fundamental principle that a general verdict must be reversed when it is possible that the jury rested its guilty verdict upon a legally infirm ground.

In *Stromberg*, this Court set aside a general verdict where a defendant was convicted of violating a California statute prohibiting the display of a red flag in public for one of three criminal purposes and one of those purposes was found to be constitutionally invalid. "As there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause." *Stromberg*, 283 U.S. at 368.

A quarter of a century later, this Court reaffirmed the *Stromberg* principle in *Yates v. United States*, overturning a conspiracy conviction where one of the two objects of a single-count conspiracy indictment was barred by the statute of limitations and thus legally invalid:

> In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not another, and it is impossible to tell which ground the jury selected.

Yates, 354 U.S. at 312 (emphasis added).

This Court revisited this principle again eight years ago in *Griffin v. United States*, 502 U.S. 46 (1991). In that case, the Court declined to set aside a verdict on a multi-object conspiracy where one of the objects was based on insufficient evidence as opposed to a legally insufficient object. The Court distinguished its ruling, however, from cases in which a jury may have relied upon a theory that is "contrary to law." *Griffin*, 502 U.S. at 57. In fact, the Court did not disturb the "many" cases that require the reversal of general conspiracy verdicts on the basis of the legal deficiency of an object rather than the sufficiency of proof. *Id.* at 57 n.2 (*citing United States v. Irwin*, 654 F.2d 671, 680 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *United States v. Head*, 641 F.2d 174, 178-179 (4th Cir. 1981), *cert. denied*, 462 U.S. 1132 (1983); *United States v. Kavazanjian*, 623 F.2d 730, 739-740 (1st Cir. 1980); *United States v. Carman*, 577 F.2d 556, 567-68 (9th Cir. 1978); *United States v. Baranski*, 484 F.2d 556, 560-561 (7th Cir. 1973)). *Griffin* confirmed that where a verdict may have rested on a ground that, although supported by the evidence, was legally inadequate, the *Yates* rule still applies and the general verdict must be reversed. *Griffin*, 502 U.S. at 60. The Court explained this distinction as follows:

> Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law. . . . Quite the opposite is

> true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well equipped to analyze the evidence.

Griffin, 502 U.S. at 58 (citations omitted).

This Court explicitly recognized in *Griffin* that juries are incapable of assessing independently whether a particular legal theory charged as an object of a conspiracy can support the conviction. Thus, if a jury is presented with a disjunctive charge that contains at least one legally erroneous object, its conviction cannot stand because there is "no reason to think that [the jury's] own intelligence and expertise will save them from that error." *Id.*

The Second Circuit ignored this principle in the instant case by guessing that the jury had deliberated and reached a verdict with respect to a legally valid object of the conspiracy. The Second Circuit found that it was not "impossible to tell whether the jury's conviction for conspiracy rested on objects asserted in the indictment that were within the limitations period." App. at 9a. With respect to Roz Ben Zvi, it held that the jury had convicted him of "timely" money laundering counts as well as filing false tax returns.[1] *Id.* With respect to Luiz Ben Zvi – who the Second Circuit acknowledged had been convicted only for conspiracy and the time-barred money laundering counts – it found that there was "no danger" that her conspiracy conviction rested solely upon the time-barred objects

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[1] While ambiguously worded, the Second Circuit's reference to "timely money laundering counts" necessarily refers only to the two international money laundering counts that were not time-barred with respect to Roz Ben Zvi since all of the domestic money laundering counts were reversed as either time-barred, multiplicitous, or because of substantial defects in the charging instructions. App. at 6a-9a, 11a-14a. As a result, the domestic money laundering object was legally invalid as to both Petitioners.

because the jury had convicted her of money laundering counts, and because wire fraud was an essential element of the money laundering counts as well as a legally valid object of the conspiracy. App. at 9a.

In reality, there was no basis on which to conclude that the jury deliberated over, let alone unanimously found, legally valid objects. The Second Circuit concluded that the jury's general verdict against Luiz Ben Zvi was valid because "the jury necessarily found that she engaged in the object of wire fraud" which was an essential element of the money laundering counts. *Id.* However, the jury convicted Luiz Ben Zvi of two legally deficient money laundering crimes (involving domestic and international money laundering). Both of these counts were dismissed by the Second Circuit as barred by the statute of limitations. It is surely possible - even probable - that the jury relied upon these legally invalid objects, rather than wire fraud, to support its conspiracy conviction against Luiz Ben Zvi.[2]

It also is possible that the jury found that Roz and Luiz Ben Zvi each committed wire fraud without concluding that they engaged in a conspiracy to do so. *United States v. Gallagher*, 576 F.2d 1028, 1047 n. 14 (3d Cir. 1978) ("the crime of conspiracy is separate and distinct from the related substantive offense. . .it is neither illogical nor impossible for a jury to find an alleged conspiracy nonexistent while, at the same time, convicting the defendants of the substantive offenses charged") (citations

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[2] In any event, this object of the conspiracy was also legally invalid with respect to Luiz Ben Zvi. As the Second Circuit recognized, under the government's theory of the case, the "specified unlawful activity" giving rise to the laundered proceeds in the money laundering counts was wire fraud. However, all of the overt acts identified in the indictment in furtherance of that object of the conspiracy were time-barred with respect to Luiz Ben Zvi. This too was a legally insufficient basis for a conspiracy conviction.

omitted). Or it may have discontinued its deliberations on the conspiracy count without reaching a verdict on the wire fraud object once it had reached a unanimous verdict that Petitioners had conspired to commit the legally deficient money laundering object(s). Finally, the trial court in this case gave a one-is-enough charge to the jury with respect to the conspiracy counts. Given that the jury returned with a general verdict, any court under these circumstances simply has no way of knowing how the jury, deliberating behind closed doors, came to its decision.

The rule announced by the Second Circuit directly conflicts with decisions of the First, Ninth and Sixth Circuits on this issue. In *United States v. Boots*, 80 F.3d 580 (1st Cir.), *cert. denied*, 519 U.S. 905 (1996), a case with strikingly similar facts, the government contended that because the jury had convicted the defendant of substantive violations of the legal valid objects charged in the conspiracy, the court could "infer" that the jury had unanimously found that the conspiratorial agreement extended to at least one legally sufficient object. *Id.* at 589. The First Circuit flatly rejected this contention, almost identical to the one embraced by the Second Circuit in this case, because there – as here – the trial court had given a "one-is-enough" instruction and had not required the jury to return a special verdict form. *Id.* at 589-90.

The First Circuit concluded that upholding such a conviction would permit the reviewing court to "speculat[e] on what the jury did or did not decide." *Id.* at 589. The First Circuit vacated the conspiracy conviction, holding instead that "it is at least possible that the jury did not ask itself whether the conspiratorial agreement extended to the two valid objects (interstate travel with intent to commit bribery, and a scheme to defraud another of honest services) with respect to all defendants, instead focusing on the overall conspiratorial agreement. . . ." *Id.* at 589.

The *Boots* holding is consistent with this Court's rulings in *Griffin* and *Yates*, and directly contradicts the Second Circuit's ruling in the instant case. The First Circuit emphasized that the mere fact that defendant had been convicted on corresponding substantive counts did not establish that the jury had also found a conspiratorial agreement. In this case, the Second Circuit committed the very error the First Circuit warned of in *Boots*; it simply presumed that the jury must have reached a particular finding when it is quite possible, even likely, that it did not.

The Second Circuit's holding also directly conflicts with decisions of the Ninth and Sixth Circuits. The Ninth Circuit has held that if "the judge instructs the jury that it need find only one of the multiple objects, and the reviewing court holds any of the supporting counts legally insufficient, the conspiracy counts also fails." *United States v. DeLuca*, 692 F.2d 1277, 1281 (9th Cir. 1982). In *DeLuca*, the Ninth Circuit Court of Appeals reversed a multi-object conspiracy conviction after it held on appeal that one of the objects of the conspiracy was legally invalid and reversed the underlying corresponding substantive count of arson. Because – as in the instant case – the "one-is-enough" jury charge permitted the jury to convict finding any one of the three objects, the conviction was reversed. *Id.* at 1281; *see also United States v. Carman*, 577 F.2d 556, 566 (9th Cir. 1978) (conviction for conspiring to commit a substantive offense must be reversed, even if other legal objectives of the conspiracy are alleged, if the substantive offense itself is reversed for failure to state a crime).

In *United States v. Palazzolo*, 71 F.3d 1233, 1237 (6th Cir. 1995), the Sixth Circuit reached the same conclusion as the First Circuit in *Boots*. The Sixth Circuit reversed a multi-object conspiracy conviction because the district court had reversed a substantive count

corresponding to an object of the conspiracy because of an erroneous instruction. The Sixth Circuit reversed the conspiracy conviction, expressly holding that that court "cannot say that anything in the record points to a conclusion that the jury detected the error in the instructions and refused to convict for conspiracy based on the structuring charge"; *see also United States v. Pettigrew*, 77 F.3d 1500, 1511 (5th Cir. 1996) (reversal of substantive counts under 18 U.S.C. § 1006 for legal defect required reversal of conspiracy count because one object of multi-object conspiracy corresponded to reversed substantive count, and court was unable to tell from general verdict form which object offense jury selected as basis for conspiracy conviction).[3]

It is a fundamental principle that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Callanan v. United States*, 364 U.S. 587, 595 (1961), *quoting Pinkerton v. United States*, 328 U.S. 640, 643 (1946); *see also Iannelli v. United States*, 420 U.S. 770, 777 (1975); *United States v. Feola*, 420 U.S. 671, 694 (1975); *Pereira v. United States*, 347 U.S. 1, 11 (1954). The essential element of a

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[3] The Second Circuit's decision also contradicts the holdings of other circuits in an analogous context. Circuit courts analyzing convictions under 18 U.S.C. § 1952 that relied on the pre-*Bailey v. United States* definition of "use" have similarly refused to uphold convictions even where the government presented sufficient evidence to convict on a "carry" charge. In *United States v. Ienco*, 92 F.3d 564, 570 (7th Cir. 1996), the Seventh Circuit refused to uphold a firearms conviction for precisely the same reason articulated in *Boots*. The Seventh Circuit held that such a conviction was invalid even though the evidence on the carry instruction was conclusive because "the evidence of use under the erroneous instruction was also conclusive, there [was] no basis for confidence that the jury even considered the evidence of carriage . . . the verdict cannot be upheld merely because we are confident that the jury would have convicted had it considered that theory." *Id.*

conspiracy that distinguishes it from the substantive offense is an agreement to commit an unlawful act. *United States v. Shabani*, 513 U.S. 10, 16 (1994); *United States v. Felix*, 503 U.S. 378, 389 (1992). The Second Circuit ignored this critical distinction in the instant case by speculating that the jury convicted on the legally valid objects because they had convicted on the substantive counts of the legal objects underlying the conspiracy charge.

II. THE FEDERAL MONEY LAUNDERING STATUTE DOES NOT EXTEND TO THE LAUNDERING OF FUNDS THAT ARE PROCEEDS OF A THEFT WHICH PRECEDED THE WIRE FRAUD CHARGED AS THE "SPECIFIED UNLAWFUL ACTIVITY"

This petition also asks the Court to review the Second Circuit's ruling that funds derived from criminal conduct that is completed before the charged "specified unlawful activity" may be the "proceeds" of that activity for purposes of the federal international money laundering statute. Review by this Court is necessary to prevent the extension of federal jurisdiction, and the broadening of criminal liability, beyond that authorized by Congress.

The subdivision of Section 1956 charged in this case requires that, as a factual matter, the funds involved in the international money laundering activity be "proceeds of specified unlawful activity." *See* 18 U.S.C. §§ 1956(a)(1)(B)(i) and 1956(a)(2)(B)(i). Offenses constituting "specified unlawful activity" for purposes of the money laundering statute are set forth at 18 U.S.C. § 1956(c)(7). It is "essential to culpability" that the "tainted money" at issue in the money laundering crime derive from one of the specifically enumerated activities in subsection (c)(7).

United States v. Stavroulakis, 952 F.2d 686, 691 (2d Cir. 1992).

Although wire and mail fraud constitute "specified unlawful activity" (*see* subsection (c)(7)), theft does not. Proceeds from a theft are ineligible to satisfy the money laundering statute because theft is not among the enumerated offenses:

> [D]espite the broad range of criminal offenses designated by the money laundering statute, the crime of theft, standing alone, is not a specified unlawful activity. It is neither a federal crime listed in section 1956 and 1961, nor one of the state-law offenses that constitute RICO predicate acts. Thus, engaging in a domestic financial transaction with the proceeds of a simple theft is not money laundering within the definition of 18 U.S.C. § 1956(a)(1).

United States v. Napoli, 54 F.3d 63, 68 (2d Cir. 1995). Nor may the "proceeds" derive from a conspiracy in violation of 18 U.S.C. § 371, as was charged in the overt acts of the multi-object conspiracy in the instant case, because conspiracy is not one of the specifically enumerated offenses.

Not only must the proceeds derive from one of the offenses specifically enumerated in subsection (c)(7), but the proceeds cannot come into existence as a result of the transaction/transfer constituting the money laundering offense. Section 1956(a)(1) "requires first that the proceeds of specified unlawful activity be generated, and second that the defendant, knowing the proceeds to be tainted, conducts or attempt to conduct a financial transaction with these proceeds." *Napoli*, 54 F.3d at 67, *quoting United States v. Piervinanzi*, 23 F.3d 670, 679-80 (2d Cir. 1994) (emphasis added); *United States v. Puig-Infante*, 19 F.3d 929, 939 (5th

Cir.), *cert. denied*, 513 U.S. 864 (1994); *United States v. Johnson*, 971 F.2d 562, 567-69 (10th Cir. 1992) (construing analogous provision under 18 U.S.C. § 1957). The offense of international money laundering, subsection (a)(2)(B)(i), contains the same language at issue in (a)(1)(B)(i), *e.g.*, "whoever . . . to conceal or disguise the nature. . . of the proceeds of specified unlawful activity . . ." (emphasis added). The two-step approach prescribed above is equally applicable to (a)(2)(B)(i) as well.

The government failed to prove at trial that the funds involved in the international money laundering charges were proceeds of "wire fraud," which is one of the offenses specifically enumerated in subsection (c)(7) and was the offense identified as the "unlawful activity" in the overt acts of the indictment. The government sought only to prove that the funds wired back to New York from Switzerland and Israel constituted the return of the cash generated by the off-the-books sale of gold before the February 26, 1988 robbery. This activity is not one of the specifically enumerated offenses and, as a result, the government's proof did not meet the requirements of the money laundering charges in this case.

The Second Circuit accepted the government's characterization of the pre-robbery sale of gold as part of the wire fraud "scheme" because it was logically and integrally related to its success. App. at 10a-11a. This characterization, however, is a semantic ruse because the only funds at issue in the wire fraud as charged was the wire transfer from Lloyd's of London to New York in August 1988. These funds were not involved in the wire transfers from Switzerland and Israel that were charged in the money laundering counts. Wire fraud requires that a defendant transmit, or cause to be transmitted, a signal, etc., with the intent to "obtain money or property by means of false or fraudulent pretenses . . ." 18 U.S.C. § 1343

(emphasis added). The statute speaks specifically of money obtained from the victim due to the fraud. Obtaining money by some other means — such as theft — is not a crime under the wire fraud statute, although it may be prosecuted in some other way.

In the instant case, the indictment alleged that the only victim defrauded by the wire fraud was Lloyds of London. The indictment made no mention of the pre-robbery gold sales in describing the wire fraud object. The wire transfers from Switzerland and Israel appear only as overt acts in furtherance of the conspiracy. The indictment thus makes clear that the proceeds from the pre-robbery gold sales were charged only as part of the multi-object conspiracy and not as part of the wire fraud object - the fraud of Lloyds. The Second Circuit erred by failing to reverse the international money laundering counts on this basis and this Court should address this issue to resolve a fundamental misapplication of the money laundering statute to the instant case.

III. THESE ISSUES ARE FUNDAMENTAL AND RECURRENT

This Court should grant certiorari to correct the Second Circuit's sharp break with the Court's precedent and other circuit courts of appeal. These issues are significant, and require this Court's review and instruction.

It is a fundamental requirement of due process that the government prove all of the elements of a criminal offense beyond a reasonable doubt. The object of a conspiracy is an element of the offense, and as a result the Fifth Amendment requires a jury to determine all of the facts necessary to establish the existence of the object of a conspiracy, and the government must prove it beyond a reasonable doubt. *See Sullivan v. Louisiana*, 508 U.S. 275,

279 (1993). The Second Circuit's decision in this case permits the government to obtain a conviction for a multi-object conspiracy without proving all of the elements of an offense beyond a reasonable doubt and allows convictions for conspiracy based on objects which fail to state a crime as a matter of law. Moreover, these issues are likely to recur, in particular because the Second Circuit's rule grants the government an enormous amount of leeway in charging and prosecuting multi-object conspiracy cases.

The Second Circuit's rule cannot be reconciled with this Court's holdings in *Stromberg, Yates*, and *Griffin* nor with the decisions of the First, Sixth and Ninth Circuits cited above. "[T]o hypothesize a guilty verdict that was never in fact rendered - no matter how inescapable the findings to support that verdict might be - would violate the jury-trial guarantee." *Sullivan*, 508 U.S. at 277. "Criminal sanctions cannot rest on what an appellate court thinks the jury would have done had the issues put to it been framed differently." *Boots*, 80 F.3d at 589 (citation and quotation omitted). That is exactly what occurred in this case, and what will continue to occur if the rule established by the Second Circuit takes hold. Upholding a multi-object conspiracy on these grounds is tantamount to "directing a verdict for the prosecution in a criminal trial, which is never permissible." *Ienco*, 92 F.3d at 570.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 97-1418, 97-1422

UNITED STATES OF AMERICA,
Appellee,

v.

LUIZ BEN ZVI and ROZ BEN ZVI,
Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of New York
Thomas C. Platt, District Judge, Presiding

Argued June 8, 1998
Decided January 21, 1999

BEFORE: OAKES and WALKER, Circuit Judges, and CARMAN.[1]

OPINION BY WALKER:

Brother and sister defendants-appellants, Roz Ben Zvi and Luiz Ben Zvi, respectively, appeal from a

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[1] The Honorable Gregory W. Carman, Chief Judge of the United States Court of International Trade, sitting by designation.

judgment entered June 26, 1997 in the United States District Court for the Eastern District of New York (Thomas C. Platt, Jr., Judge), following a jury trial. They were both convicted of a multiple-object conspiracy involving wire fraud, in violation of 18 U.S.C. § 371 (Count 1), and domestic and international money laundering, in violation of 18 U.S.C. §§ 1956 (a)(1)(B)(i), (a)(2)(B)(i) (Counts 8-11, 16-19); Roz Ben Zvi also was convicted of additional counts of domestic and international money laundering (Counts 5 and 13) and of filing false income tax returns in violation of 26 U.S.C. § 7206 (1) (Counts 2 and 3). The charges in the indictment all arose out of the defendants' scheme to defraud their insurer, Lloyd's of London, by staging a robbery of Roz Ben Zvi's jewelry business. Roz Ben Zvi was sentenced to concurrent terms on each count that totaled ten years' imprisonment, while his sister, Luiz, received concurrent terms on each count for a total term of five years' imprisonment. Additionally, both defendants were ordered to pay restitution in the amount of $6,624,512, were subjected to criminal forfeitures of $1,370,000 and two properties, and were ordered to pay special assessments.

For reasons stated below, we hold that (1) all money laundering counts charged against Luiz Ben Zvi and most of those charged against Roz Ben Zvi were time-barred, and therefore must be dismissed; (2) the judgment of criminal forfeiture against Luiz Ben Zvi, entered pursuant to the money laundering statute, must be reversed and we remand to the district court to reconsider the judgment of criminal forfeiture against Roz Ben Zvi; and (3) all of the domestic money laundering charges must be dismissed as multiplicitous with international money laundering charges for the same transactions. We affirm both defendants' convictions for conspiracy and Roz Ben Zvi's conviction on the counts of international money laundering not time-barred and for filing false tax returns. We remand to the

district court to reconsider sentencing, including forfeiture, and its order of restitution in light of this opinion.

BACKGROUND

Roz Ben Zvi was the owner of Josi Jewelry, a gold chain manufacturing business in New York City. Luiz Ben Zvi was an employee of Josi Jewelry. On February 26, 1988, police responded to cries for help at Josi Jewelry and found the Zvis bound together in a back room. The Zvis falsely told the police that unidentified assailants had overtaken them, bound them, and stolen millions of dollars worth of gold chain. In actuality, a co-conspirator tied them up after they had created the appearance of a struggle; he then struck Roz Ben Zvi for added "realism" and left them locked in the back room. The Zvis subsequently filed an insurance claim with Lloyd's of London for $3,995,000. On August 15, 1988, Lloyd's made an electronic funds transfer from London, England, to Josi Jewelry's account at Chemical Bank in New York as full payment on the claim.

In the spring of 1993, the government informed the Zvis that there were under investigation by a grand jury for possible violations of federal law. The government sought stipulations from the Zvis to toll the statute of limitations for three months as to criminal violations that were not yet time barred. Roz Ben Zvi signed a stipulation on July 2, 1993 tolling the limitations period as to him until October 2, 1993. Luiz Ben Zvi refused to stipulate to any tolling.

On August 11, 1993, the grand jury indicted Luiz Ben Zvi, alleging her participation in a conspiracy to stage the February 26, 1988 robbery in order to defraud Lloyd's. In addition to one count of conspiracy to commit wire fraud, Luiz Ben Zvi was charged with a substantive count of wire fraud based on the August 15, 1988 wire transfer from Lloyd's in London to Josi Jewelry's New York

account. On September 15, 1993, the government filed a superseding indictment alleging essentially the same criminal acts and adding Roz Ben Zvi as a defendant.

On March 9, 1994, a second superseding indictment was filed alleging that: (1) prior to the staged robbery of February 26, 1998, the Zvis had surreptitiously sold all of the gold they later claimed was stolen; (2) the Zvis allegedly laundered the proceeds of the wire fraud through six additional international funds transfers, dated May 17, 1988, July 28, 1988, September 1, 1988, September 23, 1998, November 11, 1988, and March 3, 1989; (3) Roz Ben Zvi had also engaged in three counts of laundering proceeds from narcotics trafficking and two counts of filing false tax returns; (4) international and domestic money laundering and filing false tax returns were additional objects of the conspiracy charged in count one; and (5) the Zvis were guilty of fourteen counts of money laundering, seven counts each of domestic and international money laundering for each of the seven identified funds transfers. The indictment also sought for forfeiture, pursuant to 18 U.S.C. § 1956, of all property involved in the money laundering offenses.

On May, 5, 1994, a third superseding indictment was filed that contained the forgoing allegations and added two more counts each of domestic and international money laundering against both defendants for two additional funds transfers, dated November 21, 1988, and March 1, 1989.

Before trial, in response to the defendants' motion, the district court dismissed for lack of venue the substantive wire fraud count and dismissed as time-barred the money laundering counts against both defendants based on the May 17, 1988 transfer and the money laundering count against Luiz Ben Zvi based on the July 28, 1988 transfer. At trial, the jury acquitted Roz Ben Zvi on the three counts of

laundering proceeds from narcotics trafficking. The jury deadlocked on the money laundering counts for the September 1, 1988 and September 23, 1988 transfers, and the district court granted a mistrial as to those counts. Defendants were found guilty on the remaining counts. This appeal followed.

DISCUSSION

The defendants challenge their convictions on numerous grounds. Specifically, they contend that (1) most of the money laundering counts were barred by the statute of limitations; (2) the money received from the pre-robbery sale of gold did not constitute "proceeds" of the wire fraud within the meaning of 18 U.S.C. § 1343; (3) the charges for domestic and international money laundering based on the same underlying transaction were multiplicitous; (4) the district court's recital in its jury charge of the wrong parts of the statute with respect to the elements for domestic and international money laundering constituted plain error; (5) the district court's failure to instruct the jury on the element of materiality in the false tax return claims was plain error; (6) the money laundering counts must be reversed because the substantive charge for wire fraud, which constituted the "specified unlawful activity" underlying the money laundering counts, was dismissed on venue grounds; (7) the redacted indictment, which removed the substantive charge for wire fraud, when combined with the judge's erroneous instruction concerning which wire transfers could be considered in the wire fraud count, constructively amended the indictment; (8) the district court removed the factual issue of the scope of the conspiracy from the jury by instructing the jury on the government's theory of the case; (9) the district court erred in admitting testimony that bolstered the credibility of witnesses and drew legal conclusions; and (10) the district court abused its discretion in denying Luiz Ben Zvi's motion to sever. Some of these

arguments require extended discussion; others do not. We will address each in turn.

A. Statute of Limitations

Defendants contend that all of the money laundering counts for which Luiz Ben Zvi was convicted, as well as Roz Ben Zvi's convictions based on the July 28, November 11, and November 21, 1988 funds transfers, were time-barred, because the superseding indictments first alleging these counts were filed more than five years (for Luiz Ben Zvi) and five years and three months (for Roz Ben Zvi) after the transfers occurred, in violation of 18 U.S.C. § 3282.[2] The district court agreed with the government's argument that the superseding indictments related back to the filing date of the original indictment for the purposes of the statute of limitations, ruling that none of these counts was time-barred.

The filing of an indictment tolls the limitations period for the charges contained in that indictment. *See* United States v. Grady, 544 F.2d 598, 601 (2d Cir. 1976). A superseding indictment will relate back to the date of the original indictment only if the superseding indictment does not "broaden or substantially amend the original charges." United States v. Gengo, 808 F.2d 1, 3 (2d Cir. 1986); *see also* Grady, 544 F.2d at 601-02. Superseding indictments have been deemed timely when they simply added detail to

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[2] 18 U.S.C. § 3282 provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Because Roz Ben Zvi signed a stipulation to toll the limitations period for three months, the applicable period for him is five years and three months.

the original charges, narrowed rather than broadened the charges, contained amendments as to form but not substance, or were otherwise trivial or innocuous. *See Gengo, 808 F.2d at 3-4* (relation back where superseding indictment does not present new factual allegations or require defendant to prepare new evidence or defenses); *Grady, 544 F.2d at 602* (relation back where superseding indictment narrowed, rather than broadened, charges).

The government contends that the money laundering counts added in the superseding indictments in this case did not broaden or substantially amend the original indictment because money laundering was part and parcel of the scheme to defraud Lloyd's. We disagree.

While money laundering may have been a part of the scheme to defraud, the sixteen counts of money laundering added by the superseding indictments required the defendants to defend against additional charges that alleged violations of a different statute, contained different elements, relied on different evidence, and exposed the defendants to a potentially much greater sentence. *See* United States Sentencing Guidelines §§ 2F1.1(a), 2S1.1(a). Indeed, Roz Ben Zvi received a sentence of ten years' imprisonment on each of the money laundering counts, and only five years' imprisonment on each of the other counts. These changes cannot be characterized as either trivial or innocuous.

The government points to the Gengo court's statement that "notice is the touchstone in deciding whether a superseding indictment substantially changes the original charges," 808 F.2d at 3, and argues that the superseding indictments here were timely because the government had previously informed the Zvis that it intended to prosecute them for money laundering. This argument must fail. It is the "timely, pending indictment [that] serves this doctrine

by apprising a defendant 'that [he] will be called to account for [his] activities and should prepare a defense.'" *Id.* (*quoting Grady*, 544 F.2d at 601 (alterations in original)). The issue then is whether the original indictment provided the defendant with timely notice of the charges that were later added by the superseding indictment. *Id.* Here, the original indictment failed to provide any such notice. It made no mention of the pre-robbery sale of gold or of the funds transfers that were allegedly used to launder the proceeds from the pre-robbery sale of gold.

Because we find that the statute of limitations was not tolled for these counts, we must reverse Luiz Ben Zvi's conviction on counts 8, 9, 10, 11, 16, 17, 18 and 19 and Roz Ben Zvi's conviction on counts 5, 8, 9, 13, 16, and 17, and dismiss these charges. We also reverse the judgment of criminal forfeiture against Luiz Ben Zvi, which was based on the money laundering counts, and remand the judgment of criminal forfeiture against Roz Ben Zvi, against whom money laundering convictions remain, to the district court for redetermination.

Defendants contend that if the money laundering counts are time-barred, then conviction on the conspiracy count must also be reversed because (1) the money laundering was alleged as two of the objects of the conspiracy; (2) the jury was instructed that it could convict if it found any one of the four objects charged; and (3) there is no way to determine whether they jury's verdict on the conspiracy count was based on one of the permissible objects or on one of the impermissible, time-barred objects.

Defendants are correct that a conspiracy conviction must be reversed where one or more objects is invalid and "it is impossible to tell which ground the jury selected." *United States v. Foley*, 73 F.3d 484, 493 (2d Cir. 1996) (*citing United States v. Yates*, 354 U.S. 298, 312, I L. Ed.

2d 1356, 77 S. Ct. 1064 (1957), which reversed a conspiracy conviction because one object of conspiracy was barred by statute of limitations); *see also Griffin v. United States*, 502 U.S. 46, 59, 116 L. Ed. 2d 371, 112 S. Ct. 466 (1991) (upholding conviction where jurors may have relied upon factually inadequate theory, but distinguishing cases where jury may have relied upon a theory that is "contrary to law" -- e.g., time-barred).

In this case, however, it is not "impossible to tell" whether the jury's conviction for conspiracy was based in part on objects asserted in the indictment that were within the limitations period. The jury convicted Roz Ben Zvi of timely money laundering counts as well as for filing false tax returns, both of which were objects charged in the conspiracy. Construing the evidence in the light most favorable to the government, *see United States v. Potamitis*, 739 F.2d 784, 787 (2d Cir. 1984), no reasonable jury could find that the government failed to establish either of these two valid objects of the conspiracy. *See Gengo*, 808 F.2d at 5; *see also United States v. Malpeso*, 115 F.3d 155, 166 (2d Cir. 1997) (holding that error in jury instruction was harmless because verdicts on other counts demonstrated basis for verdict).

As to Luis Ben Zvi, the issue is somewhat closer because she was convicted only for conspiracy and on time-barred money laundering counts. However, wire fraud, a legally valid object of the conspiracy, was an essential element of the money laundering counts; under the government's theory, the wire fraud was the "specified unlawful activity" giving rise to the laundered proceeds. *See* 18 U.S.C. §§ 1956 (a)(1)(B)(i), (a) (2)(B)(i). As a result, by convicting Luiz Ben Zvi of money laundering (albeit on time-barred counts), the jury necessarily found that she engaged in the object of wire fraud. Under the peculiar circumstances of this case (where the money

laundering preceded the actual wire fraud, *see infra* at Part B), unlike in *Yates*, there is no danger that Luiz Ben Zvi's conspiracy conviction rests solely upon the time-barred object of money laundering. The jury's money laundering verdict convincingly demonstrates that the jury found the object of wire fraud, which fell within the limitations period.

Because the jury's verdict on the conspiracy was based at least in part on permissible grounds, we affirm the conspiracy convictions as to both defendants.

B. Wire Fraud Proceeds

The money laundering statute penalized attempts to conceal or disguise the nature of proceeds from a "specified unlawful activity" enumerated in the statute. *See* 18 U.S.C. §§ 1956 (a)(1)(B)(i), (a)(2)(B)(i), (c)(7). Although the wire fraud scheme charged in the indictment is a statutorily specified unlawful activity, the defendants argue that their money laundering convictions must be reversed because the only proceeds proved to have been "laundered" by the Zvis were the proceeds from the pre-robbery sale of gold, not the subsequent insurance proceeds received from Lloyd's. The gold sale proceeds, they contend, were not proceeds from wire fraud but at most proceeds from simple theft, which is not a "specified unlawful activity" under the money laundering statute. *See id.* We reject the defendants' narrow definition of "proceeds."

As the government points out, the insurance proceeds received from Lloyd's were used primarily to pay creditors and consignors. The proceeds from the pre-robbery sale of gold represented the defendants' take from the scheme. Thus, the jury could reasonably have found that the sale of gold was "part of a single scheme" to commit wire fraud and that the proceeds from the sale of

gold constituted the requisite "proceeds from specified unlawful activity" under the money laundering statute. *See Potamitis*, 739 F.2d at 788 (scheme to rob, ruse by one of the conspirators to play the "victim," and scheme to conceal and divide up proceeds from robbery were all "part and parcel" of a single conspiracy). It is immaterial that the defendants kept the gold proceeds and used the insurance proceeds to pay creditors instead of the other way around; at the end of the day, the defendants had their loot as a result of the fraud and had laundered it. Accordingly, we hold that there was sufficient evidence that the requisite "proceeds" were laundered to support the jury's verdict on the money laundering charges.

C. Multiplicity of Money Laundering Charges

Each of the money laundering funds transfers identified in the superseding indictments was charged twice, once as domestic money laundering in violation of 18 U.S.C. § 1956 (a)(1)(B)(i), and once as international money laundering, in violation of § 1956(a)(2)(B)(i).[3]

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[3] Section 1956(a) provides, in pertinent part:

(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity- -..

(B) knowing that the transaction is designed in whole or in part - -

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; . . .

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States

The defendants argue that it was multiplictous to charge and convict them for both domestic and international money laundering based on the same funds transfers. We agree. An indictment is multiplicitous if it "charges a single offense in more than one count." *United States v. Maldonado-Rivera*, 922 F.2d 934, 969 (2d Cir. 1990).

> To determine whether an indictment is multiplicitous, . . . we inquire whether each of the provisions defining the offenses unambiguously authorized punishment for a violation of its terms, whether the two offenses are sufficiently distinguishable from one another that the inference that Congress intended to authorize multiple punishments is a reasonable one, and if so, whether the legislative history evidences a contrary legislative intent. The statutes are examined under the *Blockburger* test to determine if each requires proof of a fact that the other does not. *United States v. Seda*, 978 F.2d 779, 780-81 (2d Cir. 1992) (internal citations and quotation marks omitted).

The government argues that the two offenses here are sufficiently distinguishable to satisfy the *Blockburger* test (annunciated in *Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180 (1932)) because the

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or to a place in the United States from or through a place outside the United States—

(B) knowing that the monetary instrument or funds . . . represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; . . ..

domestic money laundering count required proof that the defendants engaged in a "financial transaction" involving the illegal proceeds, whereas the international money laundering count required proof that defendants "transported, transmitted, or transferred" the illegal proceeds outside of or into the country.

Although the statutes may literally require different elements to be proved, we have previously held that statutory distinctions may not always satisfy *Blockburger*, and that sometimes the facts at hand may require a finding of multiplicity. *See, e.g., United States v. Holmes*, 44 F.3d 1150, 1154-56 (2d Cir. 1995) (overturning structuring conviction as multiplicitous with money laundering conviction based on same transaction, despite two separate improper purposes); *Seda*, 978 F.2d at 781 (although "in general" we need only examine terms of the statutes, this approach is not always appropriate where statutes cover a broad range of activity).

In the context of this case, the "financial transactions" that the government had to establish in order to prove domestic laundering were the very same international "transmittals" of funds that were necessary elements of the international laundering counts. The only fact not common to both counts was the additional requirement of § 1956(a)(2)(B)(i) that the funds transfers be international. *Blockburger* is not satisfied where the elements of one charged offense are subsumed within another charged offense. *See e.g., Whalen v. United States*, 445 U.S. 684, 694, 63 L. Ed. 2d 715, 100 S. Ct. 1432 (1980) (defendant could be convicted of both rape and felony murder where underlying felony was the rape, even though rape did not require proof of murder). In *Seda*, the court held that the defendant could not be convicted of both bank fraud and filing false loan applications because there the filing of false loan applications was "simply a species of

bank fraud." 978 F.2d at 782. Here, the international transfers are simply species of financial transactions. The district court confirmed this observation when, in response to a question from the jury, it stated that the domestic money laundering statute required a financial transaction, and that the international money laundering statute required that funds be transferred into the United States from abroad, and that "otherwise the two crimes were the same." Accordingly, we hold that charging both domestic and international money laundering for these same transactions was multiplicitous.

Ordinarily, the appropriate remedy is to remand to the district court to vacate the multiplicitous counts and to adjust the sentencing accordingly. *See Holmes,* 44 F.3d at 1156 (proper remedy is to remand to district court to vacate multiplicitous counts and adjust sentence). However, as we will discuss below, the jury instruction on domestic money laundering contained substantial errors not present in the charge on international money laundering. As a result, we reverse Roz Ben Zvi's remaining convictions for domestic money laundering, counts 10 and 11, and those charges are dismissed.

D. Erroneous Charge on Money Laundering

During the jury charge, the trial court recited incorrect subsections of the domestic and international money laundering statute. In its charge on domestic money laundering, the district court recited the elements of § 1956(a)(l)(A)(i) in place of § 1956(a)(1)(B)(i); instead of stating that the transaction need occur with knowledge that "the transaction is designed in whole or in part to conceal or disguise the nature" of the proceeds, the court instructed the jury on the entirely different element that the transaction need occur "with the intent to promote the carrying on of specified unlawful activity."

On the international money laundering charge, instead of charging § 1956(a)(2)(B)(i), the district court recited the elements of the domestic laundering section, § 1956(a)(1)(B)(i). This error was less serious; both sections contained the element that the transaction be designed to conceal the proceeds from a specified unlawful activity, although the charge as given excluded the element that the transmittal of funds need be into or outside of the United States.

We review a jury charge "in its entirety and not on the basis of excerpts taken out of context." *United States v. Vebeliunas*, 76 F.3d 1283, 1290 (2d Cir.) (internal citations omitted), *cert. denied*. 519 U.S. 950, 117 S. Ct. 362, 136 L. Ed. 2d 253 (1996). When, as here, the defendants did not object to the charge and the error is trial error and not structural, we review the trial court's charge for plain error. *See United States v. Knoll*, 116 F.3d 994, 999 (2d Cir. 1997).

Under *United States v. Olano*, 507 U.S. 725, 123 L. Ed. 2d 508, 113 S. Ct. 1770 (1993), a reversal is required where there is (1) unpreserved error, that (2) is plain; (3) affects a substantial right; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *See id.* at 732; *see also* Fed. R. Crim. P. 52(b). In *Johnson v. United States*, 520 U.S. 461, 117 S. Ct. 1544, 1550, 137 L. Ed. 2d 718 (1997), the Court held that where there was no showing of a "miscarriage of justice," the fourth prong of *Olano* would not be satisfied. Under the plain error standard, we examine a jury instruction to see if it caused a miscarriage of justice when viewed as a whole and in the context of the entire trial. *See United States v. Reese*, 33 F.3d 166, 172 (2d Cir. 1994).

As we stand above, the multiplicitous charging of domestic and international money laundering requires the

dismissal of either the domestic or the international counts. Instead of remanding the case so that the district court could dismiss either the domestic or international charges, we dismiss the remaining domestic money laundering counts against Roz-Ben Zvi due to the substantial problems with the domestic money laundering instruction. As we have reversed all of the domestic money laundering charges against defendants as either time-barred or multiplicitous, we need not consider further whether the error in the domestic money laundering instruction, in and of itself, amounted to reversible plain error.

Turning to the error in the charge on international money laundering, we find that it did not rise to the level of plain error. Viewing the instructions in their entirety, we find that the correct elements of international money laundering were twice read by the court to the jury from the indictment, and the jury took the indictment into their jury room deliberations. *See Vebeliunas*, 76 F.3d at 1290 (trial court's insertion of erroneous aspects of crime ameliorated by fact that trial court stated the correct law twice). Moreover, after the jury retired to deliberate, it specifically asked the district court to explain the difference between the two money laundering charges. The district court accurately responded that the domestic laundering charge referred to a financial transaction whereas the international laundering charge required that funds be transferred from outside the United States into the United States, and that "otherwise the two crimes were the same." Finally, we note that the laundering transactions alleged in the indictment all involved overseas transfers of funds (a fact to which the parties stipulated). Accordingly, having found that the transfers occurred, the jury necessarily found that they were overseas transfers into the United States.

Based on the foregoing, we find that the erroneous jury instruction on international money laundering could not

have resulted in a miscarriage of justice and, therefore, was not plain error.

E. Omission of Element of Materiality in Tax Count Charge

Roz Ben Zvi claims that his convictions for filing false tax returns, in violation of 26 U.S.C. § 7206(1),[4] must be reversed because the district court did not instruct the jury that the false statements at issue must be material. The instruction read:

> In order to sustain its burden of proof . . . the government must prove the following four essential elements beyond a reasonable doubt.
>
> That the defendant Roz Ben Zvi did not believe the returns to be true and correct as to the gross sales and receipts of Josi Jewelry Corporation or as to the personal income of himself.

Because defendants failed to object to the instruction, we review the district court's instruction for plain error under the *Olano* test referred to above.

The omission of materiality from the jury charge was probably not error at all; and, in any event, it was not plain error. This circuit has held that the issue of materiality on false tax returns is a matter for the court to decide. *See United States v. Klausner*, 80 F.3d 55, 60-61 (2d Cir. 1996); *United States v. Greenberg*, 735 F.2d 29,

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[4] Section 7206(1) provides that a person commits a felony if he "willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under penalties of perjury, and which he does not believe to be true and correct as to every material matter." 26 U.S.C. § 7206(1) (emphasis added).

31 (2d Cir. 1984). *But see United States v. Neder*, 136 F.3d 1469, 1464 (11th Cir. 1998) (noting that every other circuit addressing the question has held that materiality under § 7206(1) is a question for the jury). Here the jury heard the district court read the indictment and the statute, both of which recite the element of materiality. The district court further instructed the jury that it could find Roz Ben Zvi guilty only if it found the particular misrepresentations contained in the indictment; all of those mispresentations entailed the failure to report substantial amounts of income and were therefore material as a matter of law. See *Klausner*, 80 F.3d at 60 (test for materiality is whether particular item must be reported in order for taxpayer to assess tax liability correctly).

In Johnson and Knoll, there was no plain error in the trial court's failure to charge the jury on materiality because the materiality was apparent from the evidence, even though under the statute at issue in those cases materiality is a jury issue. See *Johnson*, 117 S. Ct. at 1550; *Knoll*, 116 F.3d at 1000-02. In light of these decisions, a fortiori, we cannot find plain error for lack of a materiality charge when materiality is both an issue for the court and apparent from the evidence.

The better practice in false tax return cases is for the district court to make a determination of materiality, and then inform the jury that the alleged misrepresentation, if found, is material under the statute as a matter of law. Such a charge ensures that the question is not left to the jury by implication. The failure of a district court to give such an instruction could result in a wrongful acquittal if the jury decided materiality in the defendant's favor. In the face of a conviction, such a failure could never be prejudicial to a defendant even if the defendant had objected; under the law of this circuit, the jury in a false tax

return case is not empowered to resolve the question of materiality in a defendant's favor.

Materiality was an issue for the court, and materiality was apparent because the tax return at issue involved the underreporting of income by thousands of dollars. Accordingly, we affirm Roz Ben Zvi's convictions for filing false tax returns.

F. Remaining Claims

Defendants argue that the substantive wire fraud count could not constitute "specified unlawful activity" under the money laundering statute because it was dismissed for lack of venue. However, the fact that an illegal act cannot be prosecuted does not prevent the act from forming part of the basis for other charges. *See United States v. Wong*, 40 F.3d 1347, 1366-68 (2d Cir. 1994) (juvenile offenses can be used as predicates under RICO even though the juvenile conduct is not separately prosecutable); *United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987) (RICO charge may be based in part on time-barred predicate acts provided defendant committed one predicate act within the limitations period). The fact that the wire fraud charge itself was dismissed for lack of venue does not preclude its use as the "specified unlawful activity" for money laundering charges.

Defendants also argue that the deletion of count two (for wire fraud) in the redacted indictment and the trial court's instruction regarding the wire transfer element of the wire fraud count constructively amended the indictment against them. They maintain that the deletion of count two deprived the jury of guidance on the elements of wire fraud, and that the district court's instruction on wire fraud allowed consideration of the funds transfers between London, Israel, Switzerland, and the United States, even

though only the London transfer was the subject of the wire fraud charge. We disagree.

A constructive amendment occurs when the government's evidence and the jury charge combine to modify essential elements of the charge to the point that "there is a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury. *Vebeliunas*, 76 F.3d at 1290 (quoting *United States v. Clemente*, 22 F.3d 477, 482 (2d Cir. 1994)). There was no such likelihood in this case. Each of the elements of wire fraud was recited by the district court under the conspiracy charge of count one. Moreover, taken as a whole, the district court's charge clearly indicated which particular wire transfer was at issue.

We also reject defendants' contention that the district court removed from the jury the issue of whether the pre-robbery sale of gold was within the scope of the wire fraud. The charge as presented was fair to both sides, and it appropriately reflected the defense's theory of the case. *See United States v. Allen*, 127 F.3d 260, 264-65 (2d Cir. 1997).

Defendants also challenge two evidentiary rulings: first, the admission of the testimony of Alan Martin, attorney for Lloyd's, that he requested a payback agreement because he did not believe defendants' deposition testimony; and second, the admission of an IRS agent's testimony concerning the evidentiary basis for her summary chart. The admission of this evidence was not manifestly erroneous and therefore did not amount to an abuse of discretion. *See United States v. Cruz*, F.2d 659, 662 (2d Cir. 1992).

Finally, the district court did not abuse its discretion in denying Luiz Ben Zvi's motion to sever the trial. A defendant must demonstrate severe prejudice amounting to

a miscarriage of justice in order to obtain a new trial based on a district court's denial of a motion to sever. *See United States v. Rosa*, 11 F.3d 315, 341 (2d Cir. 1993). Such prejudice cannot be shown in this case. The jury's findings of guilt on some charges and acquittal on others demonstrated its ability to consider each charge against each defendant individually.

CONCLUSION

We hold that the superseding indictment that charged money laundering for the first time did not relate back to the filing of the original indictment for conspiracy and wire fraud for statute of limitations purposes. We therefore reverse all of the money laundering convictions against Luiz Ben Zvi and reverse Roz Ben Zvi's conviction for money laundering on counts 5, 8, 9, 13, 16, and 17 and dismiss these counts against both defendants. We reverse the judgment of criminal forfeiture against Luiz Ben Zvi. We also hold that charging both domestic and international money laundering for the same financial transaction was multiplicitous and therefore we reverse the convictions on counts 10 and 11 for domestic money laundering against Roz Ben Zvi and dismiss them. We vacate the judgment of criminal forfeiture against Roz Ben Zvi. We remand the case to the district court to reconsider sentencing, including forfeiture as to Roz Ben Zvi, and its order of restitution. The remaining convictions are affirmed.

Affirmed in part, vacated and remanded in part.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 14th day of April one thousand nine hundred and ninety-nine.

USA

Appellee,

v **Dkt No: 97-1418**

ROZ BEN ZVI and LUIZ BEN ZVI

Defendants-Appellants.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellants Roz Ben Zvi and Luiz Ben Zvi.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL, Clerk

/S/

Beth J. Meador,
Administrative Attorney